



## **PUBLIC INFORMATION RELEASE MEMORANDUM**

**DATE:** August 2, 2021

**SUBJECT:** Officer Involved Death

**Officer:** Officer Abraham Peterson  
California Highway Patrol

**Involved Subjects:** Sammy Ernesto Hernandez (Deceased)  
Date of Birth 12/18/72  
Fontana, CA

**Date of Incident:** August 30, 2019

**Incident location:** Westbound State Route 60 to Grove Avenue off-ramp

**DA STAR #:** 2019-58457

**Investigating Agency:** California Highway Patrol  
Rancho Cucamonga Station

**Case Agent:** Officer Mark Nelson

**Report Number#:** DR # F-137-855-19

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## **PREAMBLE**

This was an officer involved death investigated by the California Highway Patrol. This factual summary is based on a thorough review of all the investigative reports, photographs, video recordings, and audio recordings submitted by the California Highway Patrol, DR# F-137-855-19.

## **FACTUAL SUMMARY**

On August 30, 2019, at around 6:10 in the evening, Witness #1 called 9-1-1 to report a subject walking on the State Route 60 off ramp to Grove Avenue. Witness #1 advised there was a gray van on the left shoulder of the off ramp. Witness #1 said the subject, later identified as Sammy Hernandez, looked distraught and was walking in the middle of the off ramp. Witness #1 further advised Hernandez tried to walk in front of vehicles. Officer Abraham Peterson, from the California Highway Patrol, responded to the call. Officer Peterson was wearing a California Highway Patrol law enforcement uniform and driving a marked patrol vehicle.

When Officer Peterson arrived at the location, he observed a minivan on the left shoulder of the off ramp. Officer Peterson saw Hernandez standing behind the van. Officer Peterson pulled his patrol vehicle behind the van and got out to speak to Hernandez. Officer Peterson checked to see whether Hernandez was okay. Officer Peterson asked Hernandez if he was okay and why he was there. Hernandez was pacing around and appeared very distraught to Officer Peterson. Hernandez told Officer Peterson his van had overheated and also stated he no longer had a son.<sup>1</sup>

Concerned that Hernandez' son may have recently died, Officer Peterson continued to talk with Hernandez to make sure Hernandez was okay. Officer Peterson offered to give Hernandez a ride off of the freeway to a restaurant but Hernandez declined. Hernandez told Officer Peterson he could leave. Hernandez said he had just put water in his van and was waiting for it to cool down. Officer Peterson offered to let Hernandez sit in the patrol car where there was air conditioning while Hernandez waited for his van to cool down. Hernandez declined the offer and said he was fine. Hernandez, again, told Officer Peterson he could leave and that Officer Peterson did not really need to be there.

During this time, Officer Peterson observed Hernandez was slouched forward, pacing back and forth, with his head down. Hernandez kept stating he did not have a son. Officer Peterson suspected something was wrong. Hernandez appeared distraught and depressed. A couple of times during their encounter, Hernandez spoke to the backup camera next to the rear license plate of the van. When Officer Peterson asked

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<sup>1</sup> Hernandez would later explain that he found out the son he had for the last five years was not his son.

Hernandez who he was talking to, Hernandez would not give a name but said she's got an app, she's watching us. Officer Peterson told Hernandez he wanted to make sure Hernandez was good before he left. During the conversation, Hernandez stated he wanted to kill himself. At that point, Officer Peterson knew he needed to get Hernandez help. Officer Peterson asked Hernandez whether he would be willing to have an ambulance show up and he could talk to someone. Initially, Hernandez seemed reluctant to agree but eventually agreed to be checked out. Officer Peterson requested dispatch send an ambulance to the scene.

Around this time, for an unknown reason, Officer Peterson was able to hear dispatch but dispatch was unable to hear Officer Peterson over the radio. Officer Peterson decided to move closer to his patrol vehicle and asked Hernandez to go with him. Hernandez started to walk with Officer Peterson but then stopped half-way between the van and the patrol vehicle. Hernandez questioned why he needed to go to the patrol vehicle. Officer Peterson told Hernandez he just wanted to talk to him back there.

Hernandez turned back around and started heading towards his van. Officer Peterson started to follow behind Hernandez. When Officer Peterson reached the rear of the van, Hernandez was already at the left sliding door of the van and reaching inside to grab something. Officer Peterson was concerned Hernandez was getting a weapon. Officer Peterson drew his duty weapon and moved behind the van to try and create some distance between himself and Hernandez. Officer Peterson saw Hernandez come out of the van with something in his hand, but because the sun was setting Officer Peterson was unable to make out what the object was. Officer Peterson estimated he was three to four feet away from Hernandez at that time.

Hernandez started walking back toward Officer Peterson. Officer Peterson backed away and moved around to the right passenger side of the van. Officer Peterson was standing between the van and the traffic lane when Officer Peterson saw Hernandez had a hammer in his hand. Officer Peterson was scared when he saw the hammer. Officer Peterson ordered Hernandez to put the hammer down. Hernandez held the hammer up right by his shoulder. Hernandez yelled at Officer Peterson, "Just fucking shoot me. Just fucking shoot me."

Hernandez was moving forward towards Officer Peterson when Hernandez stopped and looked down towards the rear license plate on Hernandez' van. Hernandez appeared to be talking to someone. Hernandez bent down, looked at the license plate, and said, "Is this what you wanted?" At this time, Officer Peterson transitioned from his duty weapon to his Taser.

Officer Peterson deployed one cartridge at Hernandez but the first cartridge was ineffective. The cartridge stunned Hernandez and made Hernandez stand back up. Hernandez appeared upset and raised the hammer back up like he was going to charge Officer Peterson. Officer Peterson deployed a second cartridge at Hernandez. The second cartridge was effective and Hernandez fell to the ground. Officer Peterson was then able to approach Hernandez and handcuff him in the back. Officer Peterson took

the hammer and tossed it away from Hernandez. Around that time, Officer Thomas Harrington, Officer Brian Baker, and Officer Ruben Aceves, from the California Highway Patrol arrived at the scene.

Officer Peterson noticed Hernandez was frothing around the mouth and his breathing was labored. Officer Peterson leaned Hernandez on his right side so Hernandez would not choke. Officer Peterson checked Hernandez for a pulse. Hernandez' pulse was weak. Officer Peterson continued to recheck Hernandez for a pulse. At one point, Officer Peterson could not feel a pulse anymore and started CPR. The handcuffs were taken off Hernandez. Officer Peterson continued with CPR until the fire department arrived at the scene. Officer Peterson estimated he was doing chest compressions for three to five minutes before fire department personnel arrived. Medical personnel then took over administering CPR.

Hernandez was placed into an ambulance and transported to San Antonio Regional Hospital and placed in the intensive care unit. On August 31, 2019, at around 11:21 in the morning, Witness #4 pronounced Hernandez deceased from a severe hypoxia brain injury.

A hammer, Vaughan 999TML 20 oz. hammer, was recovered at the scene during the investigation.

Witness #3, Forensic Pathologist for the San Bernardino County Sheriff's Department Coroner Division, conducted the autopsy of Sammy Hernandez on September 6, 2019. Witness #3 determined the cause of death was Hypoxic ischemic encephalopathy<sup>2</sup> due to physiological stress, acute methamphetamine toxicity and electrical shock from a neuromuscular incapacitation device in an individual with cardiomegaly<sup>3</sup> (hours). Witness #3 concluded the manner of death was undetermined.

### **STATEMENTS BY POLICE OFFICERS**

On September 3, 2019, at approximately 8:23 in the morning, **Officer Abraham Peterson** was interviewed by Officer Mark Nelson.<sup>4</sup>

On August 30, 2019, Officer Abraham Peterson, from the California Highway Patrol, was assigned to roving detail for driving under the influence investigations at the Rancho Cucamonga station. Officer Peterson was wearing a California Highway Patrol uniform and driving a marked patrol vehicle. On that date, at around 6:15 in the

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<sup>2</sup> This is a brain injury caused by oxygen deprivation to the brain. "What Is Encephalopathy?" *WebMD*, [www.webmd.com/brain/what-is-encephalopathy](http://www.webmd.com/brain/what-is-encephalopathy).

<sup>3</sup> This is an enlarged heart. "Enlarged Heart (Cardiomegaly)." *WebMD*, Medically Reviewed by James Beckerman, MD, FACC on August 24, 2020, [www.webmd.com/heart-disease/guide/enlarged-heart-causes-symptoms-types](http://www.webmd.com/heart-disease/guide/enlarged-heart-causes-symptoms-types).

<sup>4</sup> Officer Peterson reviewed the Mobile Video Audio Recording Systems (MVARs) video recording from his patrol vehicle prior to being interviewed by Officer Nelson.

evening, Officer Peterson responded to a call of a pedestrian walking on westbound State Route 60 off-ramp to Grove Avenue. When Officer Peterson arrived at the location, he observed a van on the left shoulder of the off-ramp. Hernandez was standing behind the van. Officer Peterson pulled his patrol vehicle behind the van and got out to speak to Hernandez.

Officer Peterson checked to see whether Hernandez was okay. Hernandez was pacing around and appeared very distraught to Officer Peterson. Hernandez told Officer Peterson his van had overheated and also stated he no longer had a son. Concerned that Hernandez' son may have recently died, Officer Peterson continued to talk with Hernandez to make sure Hernandez was okay. Officer Peterson offered to give Hernandez a ride off of the freeway to a restaurant but Hernandez declined. Hernandez told Officer Peterson he could leave. Hernandez said he had just put water in his van and was waiting for it to cool down.

Officer Peterson offered to let Hernandez sit in the patrol car where there was air conditioning while Hernandez waited for his van to cool down. Hernandez declined the offer and said he was fine. Hernandez, again, told Officer Peterson he could leave and that Officer Peterson did not really need to be there. During this time, Officer Peterson observed Hernandez was slouched forward, pacing back and forth, with his head down. Hernandez kept stating he did not have a son. Officer Peterson suspected something was wrong. Hernandez appeared distraught and depressed. A couple of times during their encounter, Hernandez spoke to the backup camera next to the rear license plate of the van. When Officer Peterson asked Hernandez who he was talking to, Hernandez would not give a name but said she's got an app, she's watching us.

Officer Peterson told Hernandez he was sworn to help people and he wanted to make sure Hernandez was good before he left. Officer Peterson started to tell Hernandez that he had been through rough times but before Officer Peterson was able to finish his sentence, Hernandez stated he wanted to kill himself. At that point, Officer Peterson knew he needed to get Hernandez help. Officer Peterson asked Hernandez whether he would be willing to have an ambulance show up and he could talk to someone. Initially, Hernandez seemed reluctant to agree.

Hernandez asked for a drink. Hernandez had a drink in his vehicle so Officer Peterson allowed Hernandez to go back to his van to get a drink. Hernandez sat down on the left side passenger compartment sipping his drink. Officer Peterson, again, asked whether Hernandez would be willing to talk to someone if an ambulance showed up. Officer Peterson told Hernandez he did not have to go anywhere with them but asked Hernandez to let them come check Hernandez out. Hernandez agreed and Officer Peterson called for an ambulance.

At around this time, dispatch tried to get a hold of Officer Peterson over his radio on his person. For some reason, dispatch was unable to hear Officer Peterson so he wanted to move closer to his patrol vehicle. Officer Peterson asked Hernandez to walk with Officer Peterson back to the patrol vehicle. Hernandez started to walk with Officer

Peterson but then stopped half-way between the van and the patrol vehicle. Hernandez asked Officer Peterson why he needed Hernandez to walk back to the patrol vehicle. Officer Peterson told Hernandez he just wanted to talk to him back there.

Hernandez turned back around and started heading towards his van. Officer Peterson started to follow behind Hernandez. When Officer Peterson reached the rear of the van, Hernandez was already at the left sliding door on the driver side of the van and reaching inside. Based upon the way Hernandez moved back to the van and reached inside the vehicle, Officer Peterson believed Hernandez was grabbing something. Officer Peterson was concerned Hernandez was getting a weapon. Officer Peterson drew his duty weapon and moved behind the van to try and create some distance between himself and Hernandez. Officer Peterson saw Hernandez come out of the van with something in his hand, but because the sun was setting Officer Peterson was unable to make out what the object was. Officer Peterson estimated Hernandez was approximately three to four feet from Officer Peterson at that time.

Hernandez started walking back toward Officer Peterson so Officer Peterson moved around toward the right side of the van. Officer Peterson was standing on the right side of the van, between the van and the traffic lane, when Officer Peterson could see Hernandez had a hammer in his hand. Officer Peterson was scared when he saw the hammer. Officer Peterson did not want to shoot Hernandez but was prepared to protect himself. Officer Peterson ordered Hernandez to put the hammer down. Hernandez had the hammer up right by his shoulder. Hernandez yelled at Officer Peterson, "Just fucking shoot me. Just fucking shoot me."

Hernandez was moving forward towards Officer Peterson when Hernandez stopped and looked down towards the rear license plate on Hernandez' van. Hernandez appeared to be talking to someone. Hernandez bent down, looked at the license plate, and said, "Is this what you wanted?" At this time, Officer Peterson transitioned from his duty weapon to his Taser.

Officer Peterson deployed one cartridge at Hernandez but the first cartridge was unsuccessful. The cartridge stunned Hernandez and made Hernandez stand back up. Hernandez appeared upset and raised the hammer back up like he was going to charge Officer Peterson. Officer Peterson deployed a second cartridge at Hernandez. The second cartridge was successful and Hernandez fell to the ground. Officer Peterson was then able to approach Hernandez and handcuff him in the back. Officer Peterson placed the handcuff on Hernandez' left hand first, rolled Hernandez over onto his stomach, and then handcuffed Hernandez' right hand. Officer Peterson took the hammer and tossed it away from Hernandez.

Right after Officer Peterson handcuffed Hernandez, Officer Peterson noticed Hernandez was frothing around the mouth and his breathing was labored. Officer Peterson quickly patted Hernandez down for weapons. Officer Peterson then leaned Hernandez on his right side so Hernandez would not choke. Officer Peterson checked Hernandez for a pulse on Hernandez' carotid artery. Hernandez had a pulse but it was weak. Around

that time, Officer Thomas Harrington, Officer Brian Baker, and Officer Ruben Aceves, from the California Highway Patrol arrived at the scene. According to the incident detail report, Officer Harrington arrived approximately 1 minute and 26 seconds after Officer Peterson took Hernandez into custody. Officer Baker and Officer Aceves arrived approximately 2 minutes and 23 seconds after Hernandez was in custody.

When Officer Harrington arrived, he asked Officer Peterson what he needed. Officer Peterson told Officer Harrington to bring him a bag valve mask (BVM)<sup>5</sup> because Officer Peterson did not think Hernandez would be breathing much longer. Officer Peterson thought Officer Harrington may have misunderstood what he said because Officer Harrington ran back to his patrol car and returned with a spit mask. As Officer Harrington returned with the spit mask, Officer Peterson saw Officer Baker and Officer Aceves. Officer Peterson yelled out to them that he needed a BVM.

During this time, Officer Peterson continued to check Hernandez for a pulse and check Hernandez' breathing. Right before Officer Baker returned to Officer Peterson's location with the BVM, Officer Peterson could no longer feel a pulse and immediately started cardiopulmonary resuscitation (CPR). According to the incident detail report, Officer Peterson started performing CPR approximately 5 minutes and 9 seconds after Hernandez was taken into custody. Officer Aceves told Officer Peterson they need to take the handcuffs off Hernandez. Officer Peterson briefly stopped CPR while Officer Aceves took off the handcuffs. Officer Peterson continued with CPR until the fire department arrived at the scene. Officer Peterson estimated he was doing chest compressions for approximately three to five minutes before fire department personnel arrived. Medical personnel then took over doing CPR. Hernandez was placed into an ambulance and transported to the hospital.

On September 3, 2019, at approximately 11:02 in the morning, **Officer Ruben Aceves** was interviewed by Officer Mark Nelson.

On August 30, 2019, Officer Ruben Aceves, from the California Highway Patrol, was assigned to the Rancho Cucamonga station. On that date, Officer Aceves was at a traffic collision when he heard a radio call put out by Officer Peterson asking for help. Officer Peterson indicated someone was coming at him with a hammer. Officer Aceves left his location and responded to the call which was at State Route 60 and Grove Avenue off-ramp. Officer Brian Baker was riding with Officer Aceves on that date. When Officer Aceves and Officer Baker arrived at the location, Officer Aceves saw that Officer Thomas Harrington was already there.

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<sup>5</sup> A bag valve mask is a self-inflating bag used to provide ventilation to a person not breathing normally. "What Is Bag Valve Mask Ventilation (BVM) Used For?" Medical author: Divya Jacob, Pharm. D. Medical Reviewer: Pallavi Suyog Uttekar, MD, Medically Reviewed on 7/15/20. [www.medicinenet.com/what\\_is\\_bag\\_valve\\_mask\\_ventilation\\_bvm\\_used\\_for/article.htm](http://www.medicinenet.com/what_is_bag_valve_mask_ventilation_bvm_used_for/article.htm).



Officer Aceves and Officer Harrington walked up and saw Officer Peterson over a subject, later identified as Sammy Hernandez, who was already handcuffed. There was a hammer laying approximately five feet away from Hernandez. Officer Aceves noticed Hernandez was having a hard time breathing and his breathing was labored. Officer Aceves took out his handcuff keys and took the handcuffs off Hernandez. Officer Aceves knew they needed to do CPR on Hernandez. Once the handcuffs were off, Officer Peterson started CPR on Hernandez.

Other than taking the handcuffs off Hernandez, Officer Aceves never used any force on Hernandez. Officer Aceves also never witnessed any other officers use force on Hernandez.

On September 3, 2019, at approximately 11:02 in the morning, **Officer Brian Baker** was interviewed by Officer Mark Nelson.

On August 30, 2019, Officer Brian Baker, from the California Highway Patrol, was assigned to the Rancho Cucamonga station. Officer Baker was riding with Officer Ruben Aceves. Officer Baker was at the scene of a traffic collision waiting for Officer Peterson to come pick him up so they could start a driving under the influence roving detail. Officer Baker heard Officer Peterson over the radio request an additional unit. Officer Baker and Officer Aceves responded in the same patrol unit, to Officer Peterson's location which was at State Route 60 and Grove Avenue off-ramp.

When Officer Baker arrived at the location, he observed Officer Peterson's patrol vehicle stopped directly behind a silver minivan. Officer Baker saw Hernandez laying on the ground foaming at the mouth. Officer Peterson was over Hernandez doing a sternum rub and trying to administer medical aid. Officer Aceves took off Hernandez' handcuffs so they could position Hernandez better. Officer Baker saw a hammer behind Hernandez' head. Officer Baker also observed Officer Peterson checking Hernandez for a pulse.

Officer Peterson told Officer Baker to go get a breather mask. Officer Baker went and retrieved a breather mask from Officer Aceves' patrol vehicle. While Officer Baker was retrieving the mask, Officer Baker saw Officer Peterson start CPR on Hernandez. Fire department personnel soon arrived and took over administering medical aid to Hernandez.

While at the scene, Officer Baker did not witness any officer use force on Hernandez. Officer Baker and Officer Peterson spoke briefly at the scene about what happened. Officer Peterson explained that Hernandez seemed agitated when he contacted him and eventually Officer Peterson was able to calm Hernandez down. Officer Peterson advised Officer Baker that Hernandez had said he wanted to harm himself and that Officer Peterson called for an ambulance for a possible suicidal subject. Officer Peterson said his radio was not working very well so he went back to his patrol vehicle to get better reception and asked Hernandez to go with him. Officer Peterson told

Officer Baker that Hernandez then walked briskly back towards Hernandez' vehicle, reached inside, and came out with a hammer.

On September 3, 2019, at approximately 2:59 in the afternoon, **Officer Thomas Harrington** was interviewed by Officer Mark Nelson.

On August 30, 2019, Officer Thomas Harrington, from the California Highway Patrol, was assigned to patrol at the Rancho Cucamonga station. Officer Harrington was monitoring their incident log when he saw a call of a pedestrian on the freeway at Grove Avenue. Officer Harrington decided to respond to the scene. While en route, Officer Harrington heard Officer Peterson put out that he would be en route to the same call and approximately one minute later Officer Peterson arrived at the location.

Initially, Officer Harrington heard Officer Peterson, over the radio, request dispatch to start medical. Another officer asked if he was needed and Officer Peterson said no. However, approximately twenty to thirty seconds later, emergency traffic came out and Officer Peterson's tone of voice sounded like he needed help. Having worked with Officer Peterson in the past, Officer Harrington knew something was obviously wrong and continued to the scene. Officer Harrington heard additional radio traffic from Officer Peterson but it was garbled and Officer Harrington could not completely make out what Officer Peterson was saying. Officer Harrington heard the Taser was deployed and one person was in custody.

When Officer Harrington arrived at the location, he parked his patrol vehicle directly in front of the subject's minivan. Officer Harrington exited his patrol vehicle and saw Officer Peterson in between Officer Peterson's patrol vehicle and the minivan. Officer Peterson had Hernandez handcuffed and on Hernandez' right side. Officer Peterson was "kind of straddling behind" Hernandez. Officer Harrington described Officer Peterson as "kind of on his knees" or "kind of squatting" behind Hernandez. saw Officer Peterson Officer Harrington observed a hammer laying on the ground in between Officer Peterson's patrol vehicle and the minivan. Officer Harrington recalled seeing one Taser dart in Hernandez' forehead.

Officer Peterson yelled something out to Officer Harrington. Officer Harrington thought Officer Peterson asked him for a spit sock. Officer Harrington thought maybe Hernandez was still fighting and ran back to his patrol vehicle to get the spit sock. When Officer Harrington returned, he saw Hernandez was foaming at the mouth; there was spit and saliva coming out of Hernandez' mouth. Officer Harrington put the spit sock<sup>6</sup> on Hernandez and asked Officer Peterson whether Hernandez was spitting on him. Officer Peterson said no. At that time, Officer Harrington realized Hernandez was in distress.

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<sup>6</sup> A spit sock or spit mask is a mesh type of hood that can be placed over a person's head to prevent them from spitting at a law enforcement officer.

Officer Peterson rolled Hernandez onto his back and started doing CPR, just chest compressions. Hernandez started gurgling and breathing again. Officer Harrington pulled the spit sock above Hernandez' eyes, realizing it was not needed. Officer Peterson had been asking for a pocket mask. Officer Harrington estimated the spit sock was on Hernandez for approximately thirty to forty seconds before being pulled up over Hernandez' eyes. Hernandez' handcuffs were removed to try and make it easier for Hernandez to breath. Officer Peterson continued to do CPR for approximately two to four minutes until fire department personnel arrived and took over.

Other than when he placed the spit sock on Hernandez, Officer Harrington said he did not place hands on Hernandez. When Officer Harrington arrived at the scene, he did not observe any type of force being used by Officer Peterson.

### **STATEMENTS BY CIVILIAN WITNESSES**

On September 10, 2019, at approximately 11:10 in the morning, **Witness #1** was interviewed over the telephone by Officer Mark Nelson.

On August 30, 2019, Witness #1 was exiting State Route 60 at the Grove Avenue off-ramp. Witness #1 noticed Hernandez on the left-hand side of the off-ramp, wandering around his vehicle. Witness #1 slowed her vehicle, kept her distance, and started to pass Hernandez. Hernandez threw himself in front of Witness #1's vehicle. Hernandez was screaming. Witness #1 drove forward a safe distance, pulled over, and called 9-1-1. While Witness #1 was on the phone, she noticed Hernandez was running out in front of other vehicles. Witness #1 waited in the area until she saw a California Highway Patrol vehicle drive up. Witness #1 then left the area.

On September 10, 2019, at approximately, 11:10 in the morning, **Witness #2** was interviewed over the telephone by Officer Mark Nelson.

On August 30, 2019, Witness #2 was exiting State Route 60 at the Grove Avenue off-ramp. Witness #2 saw Hernandez in the middle of the off-ramp. There were two vehicles ahead of Witness #2 Hernandez made no attempt to move out of the way of the oncoming vehicles. Hernandez stayed in the middle of the off-ramp. Vehicles veered as far as they could on the right shoulder of the off-ramp to avoid hitting Hernandez. Witness #2 called 9-1-1 and advised Hernandez was "basically flopping around in the middle of the off-ramp." Witness #2 was concerned someone was going to hit Hernandez. Witness #2 slowed his vehicle and moved over to the right to pass Hernandez.

## **INCIDENT AUDIO AND VIDEO**

**MVARS RECORDING.** All MVARS recordings submitted were reviewed in their entirety.<sup>7</sup>

### **Officer Abraham Peterson**

The MVARS recording from Officer Peterson's patrol vehicle was approximately 38 minutes and 06 seconds in length.

The recording appeared to start while Officer Peterson was driving on the freeway. At 1 minute and 11 seconds<sup>8</sup> Officer Peterson exited the freeway. Officer Peterson was heard speaking to dispatch. At 1 minute 30 seconds Officer Peterson pulled his patrol vehicle behind a minivan which was parked on the left side of the off ramp. Hernandez was visible outside of the van. However, there was a glare from the sun and the objects in the video were not clearly visible. Officer Peterson was heard asking Hernandez whether he was okay. Hernandez told Officer Peterson his vehicle overheated. At 2 minutes Officer Peterson exited his patrol vehicle. Radio traffic was heard in the background.

At 2 minutes 50 seconds Officer Peterson was seen in the left-hand corner of the video. Officer Peterson appeared to be talking. Hernandez was not visible on the video at this time. At 3 minutes 15 seconds Hernandez was seen on the video talking to Officer Peterson. Officer Peterson and Hernandez stood in between the rear of Hernandez' minivan and the front of Officer Peterson's patrol vehicle. Cars were seen driving past

Officer Peterson and Hernandez. At 3 minutes 57 seconds Officer Peterson requested roadside service to help with Hernandez' minivan.

Officer Peterson and Hernandez were seen speaking with one another. Hernandez appeared to be pacing back and forth during this time. Radio traffic could still be heard in the background. At 10 minutes 15 seconds Officer Peterson was heard over the radio advising of a possible suicidal subject. At 11 minutes 40 seconds Officer Peterson appeared to still be talking to Hernandez.

At 14 minutes 17 seconds dispatch asked Officer Peterson if he needed another unit to respond. There was no response heard from Officer Peterson. Dispatch asked Officer Peterson again if he needed another unit to respond. Dispatch did not get a response from Officer Peterson and proceeded to request another unit respond to the location. Officer Peterson went out of sight of the camera. At 15 minutes 12 seconds Officer

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<sup>7</sup> Summary of the MVARS recording will only cover from the start of the recording and end at the point immediately following the lethal force encounter.

<sup>8</sup> Times listed in the MVARS summary are for reference only.

Peterson was heard saying “negative” when asked to confirm whether he needed another unit to respond.

At 15 minutes 23 seconds Hernandez was seen walking back to the minivan. Officer Peterson followed behind Hernandez. At 15 minutes 28 seconds Officer Peterson drew his weapon and quickly backed up around the rear of the minivan. At 15 minutes 30 seconds Hernandez appeared to be walking towards the rear of the minivan towards Officer Peterson. Hernandez held something<sup>9</sup> in his right hand. The object appeared to be metallic; the sun reflected off the object. Hernandez held the object up above his shoulder as he walked towards Officer Peterson. At 15 minutes 32 seconds Officer Peterson was seen standing with his duty weapon drawn and pointed out in front of him. Hernandez had his right arm up, holding a metal object in his hand.

At 15 minutes 34 seconds Officer Peterson was heard over the radio requesting additional units be sent. At 15 minutes 42 seconds Officer Peterson still had his gun drawn and pointed at Hernandez. Hernandez appeared to briefly stop moving forward. At 15 minutes 52 seconds Officer Peterson appeared to deploy his Taser. At 15 minutes 55 seconds Hernandez suddenly moved forward towards Officer Peterson. Officer Peterson started to move backward and deployed the Taser. Hernandez appeared to move backward. Officer Peterson then moved forward towards Hernandez. Officer Peterson and Hernandez were no longer seen on camera. At 16 minutes 10 seconds Officer Peterson could be heard on the radio advising his Taser had been deployed and he had one subject down. At 17 minutes 20 seconds Officer Peterson advised dispatch that Hernandez ran at him with a hammer.

### **CRIME SCENE INVESTIGATION**

A hammer, Vaughan 999TML 20 oz. hammer, was recovered at the scene during the investigation.

### **DECEDENT**

**AUTOPSY.** Witness #3, Forensic Pathologist for the San Bernardino County Sheriff's Department Coroner Division, conducted the autopsy of Sammy Hernandez on September 6, 2019. Witness #3 determined the cause of death was Hypoxic ischemic encephalopathy, due to physiological stress, acute methamphetamine toxicity and electrical shock from a neuromuscular incapacitation device in an individual with cardiomegaly (hours). Witness #3 concluded the manner of death was undetermined.

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<sup>9</sup> Officer Peterson stated in his interview the object was a hammer. However, the object cannot be clearly seen in the MVARS video recording.

**Neuromuscular Incapacitation Device Injuries:**

There was a penetrating wound of the left frontoparietal scalp (0.5 cm) with underlying subcutaneous hemorrhage and subgaleal hemorrhage of the left frontoparietal bone. There was also an abrasion of the right chest (0.5 x 0.3 cm) with underlying subcutaneous hemorrhage.

**TOXICOLOGY.** Hospital blood sample was collected from Hernandez.

Toxicology results for the **Hospital Blood** sample were listed as follows:

- Caffeine – positive
- Amphetamine – 28 ng/mL
- Methamphetamine – 130 ng/mL

**CRIMINAL HISTORY.** 1998, 11550(a) of the Health and Safety Code, Use/Under the Influence of Controlled Substance. Orange County Court case number 6WH05417-01, a misdemeanor.

1998, 14601.1(a) of the Vehicle Code, Driving While License is Suspended. Orange County court case number 6WH02955-01.

2006, 459 of the Penal Code, First Degree Burglary. Los Angeles County court case number VA096631, a felony.

2010, 664/459 of the Penal Code, Attempt First Degree Burglary. San Bernardino County court case number FCH900261, a felony.

2011, 496(a) of the Penal Code, Receive/ETC Known Stolen Property. San Bernardino County court case number FCH1100315, a felony.

2013, 23152(a) of the Vehicle Code, Driving Under the Influence of Alcohol, and 23152(b) of the Vehicle Code, Driving with a Blood Alcohol of .08 Percent or Higher. Riverside County court case number RIM1114187, a misdemeanor.

2016, 594(b)(1) of the Penal Code, Vandalism. San Bernardino County court case number FSB1503737, a felony.

## **DE-ESCALATION**

During his interaction with Hernandez, Officer Peterson made multiple attempts to help Hernandez. Officer Peterson requested a tow truck respond to look at Hernandez' minivan. Officer Peterson offered to give Hernandez a ride off the freeway to a nearby restaurant. Officer Peterson told Hernandez he was welcome to sit in Officer Peterson's patrol vehicle where there was air conditioning and Officer Peterson would wait with him. When Hernandez mentioned he no longer had a son and that he wanted to kill himself, Officer Peterson continued to talk to Hernandez and reassure Hernandez that he wanted to help. Officer Peterson offered to have an ambulance respond to the location so Hernandez could talk to someone and get checked out. At the point Hernandez grabbed the hammer from his van, Officer Peterson made several attempts to de-escalate the situation. Officer Peterson drew his duty weapon and backed up around the van in an attempt to create distance between himself and Hernandez. Officer Peterson gave verbal commands ordering Hernandez to drop the hammer. Hernandez failed to comply with those commands and continued to advance towards Officer Peterson. When Hernandez stopped and bent down to talk to the rear license plate of the minivan, Officer Peterson saw an opportunity to transition to less lethal force and possibly avoid killing Hernandez. Officer Peterson transitioned from his duty weapon to his Taser. When Hernandez raised the hammer upward, Officer Peterson deployed the Taser twice in an effort to stop Hernandez from attacking him. At no time did Hernandez cooperate with Officer Peterson.

## **APPLICABLE LEGAL PRINCIPLES**

**PENAL CODE SECTION 245(a)(1).** Any person who commits an assault upon the person of another with a deadly weapon or instrument other than a firearm shall be punished by imprisonment in the state prison for two, three, or four years, or in a county jail for not exceeding one year, or by a fine not exceeding ten thousand dollars (\$10,000), or by both the fine and imprisonment.

A peace officer may use reasonable force to effect an arrest if he believes that the person to be arrested has committed a public offense. (Calif. Penal C. §835a)<sup>10</sup> Should the arresting officer encounter resistance, actual or threatened, he need not retreat from his effort and maintains his right to self-defense or to use reasonable force to effect that arrest. (*Id.*) An arrestee has a duty to refrain from using force or any weapon to resist lawful arrest, if he knows or should know that he is being arrested. (Penal C. §834a.)

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<sup>10</sup> All references to code sections here pertain to the California Penal Code, as they existed at the time of the incident. Significant modifications were made to sections 196 and 835a pursuant to Assembly Bill 392. (Assem. Bill No. 392 (2018-2019 Reg. Sess.) as Chaptered August 19, 2019.) However, those modifications do not apply retroactively. Even if they did, the conclusion of the analysis would be the same.

An officer-involved shooting may be justified as a matter of self-defense, which is codified in Penal Code at §§196 and 197. Both of these code sections are pertinent to the analysis of the conduct involved in this review and are discussed below.

**PENAL CODE SECTION 196.** Police officers may use deadly force in the course of their duties under circumstances not available to members of the general public. Penal Code §196 states that use of deadly force by a public officer is justifiable when necessarily used in arresting persons who are charged with a felony and who are fleeing from justice or resisting said arrest. Application of the section is broader than on its face; formal written charges are not required. (*People v. Kilvington* (1894) 104 Cal. 86, 92.) When a police officer has probable cause to believe that the suspect he is attempting to apprehend “has committed a crime involving the infliction or threatened infliction of serious physical harm” to the officer or others, using deadly force to prevent escape is not constitutionally unreasonable. (*Tennessee v. Garner* (1985) 471 U.S. 1, 11-12.)

The relevant criminal jury instruction, as written by the Judicial Council of California, is set forth in CALCRIM 507 (“Justifiable Homicide: By Public Officer”). As it may be relevant in this case, a justifiable homicide by a peace officer requires finding a that the police officer acted as follows:

- (1) while arresting a person charged with a felony who was resisting arrest; while overcoming actual resistance to some legal process; or while performing any legal duty, and
- (2) the officer had probable cause to believe that the decedent posed a threat of death or great bodily injury either to the defendant or to others.

(CALCRIM 507)

No variation of the word “reasonable” appears in Penal Code §196, but the principle as applied necessarily requires that an officer’s conduct be reasonable. A homicide is justifiable under Penal Code §196 when the circumstances reasonably created a fear of death or serious bodily harm to the officer or to another. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 349.) This standard under Penal Code § 196 is consistent with the Supreme Court standard for reasonable force as stated in *Garner, supra*, 471 U.S. at 11-12. Whether police actions are reasonable under Penal Code section 196 depends on the facts and circumstances known to the peace officer at the time of the arrest. This rule applies even if subsequent investigation reveals the suspect was not guilty of the suspected felony. (*Kilvington, supra*, 104 Cal. at 93.) Similarly, when a police officer reasonably believes a suspect may be armed, it does not change the analysis even if subsequent investigation reveals the suspect was unarmed. (*Reese v. Anderson* (5th Cir. 1991) 926 F.2d 494, 501; *Anderson v. Russell* (4th Cir. 2001) 247 F.3d 125, 129, 131.) California courts have held that when a police officer’s actions are reasonable under the Fourth Amendment, the requirements of Penal Code §



196 are satisfied. (*Martinez v. County of Los Angeles, supra*, at 349; *Brown v. Grinder* (E.D. Cal., Jan. 22, 2019) 2019 WL 280296, at \*25.)

**PENAL CODE SECTION 197.** California law permits *all persons* to use deadly force to protect themselves from the imminent threat of death or great bodily injury. Penal Code §197 provides that the use of deadly force by any person is justifiable when used in self-defense or in defense of others.

The pertinent criminal jury instruction to this section is CALCRIM 505 (“Justifiable Homicide: Self-Defense or Defense of Another”). The instruction, rooted in caselaw, states that a person acts in lawful self-defense or defense of another if :

- (1) he reasonably believed that he or someone else was in imminent danger of being killed or suffering great bodily injury, and;
- (2) he reasonably believed that the immediate use of deadly force was necessary to defend against that danger.

(CALCRIM 505.)

“Imminence is a critical component of both prongs of self-defense.” (*People v. Humphrey* (1996) 13 Cal.4th 1073, 1094.) A person may resort to the use of deadly force in self-defense, or in defense of another, where there is a reasonable need to protect oneself or someone else from an apparent, imminent threat of death or great bodily injury. “An imminent peril is one that, from appearances, must be instantly dealt with.” (*In re Christian S.* (1994) 7 Cal.4th 768, 783.) The primary inquiry is whether action was instantly required to avoid death or great bodily injury. (*Humphrey, supra*, 13 Cal.4th at 1088.) What a person knows and his actual awareness of the risks posed against him are relevant to determine if a reasonable person would believe in the need to defend. (*Id.* at 1083.) In this regard, there is no duty to wait until an injury has been inflicted to be sure that deadly force is indeed appropriate. (*Scott v. Henrich* (9th Cir. 1994) 39 F. 3d 912, 915.)

There is no requirement that a person (including a police officer) retreat even if safety could have been achieved by retreating. (*Id.*, see also CALCRIM 505.) In addition, police officers are not constitutionally required to use all feasible alternatives to avoid a situation where the use of deadly force is reasonable and justified. (*Martinez v. County of Los Angeles* (1996) 47 Cal.App.4th 334, 348.) The court in *Scott* explained:

Requiring officers to find and choose the least intrusive alternative would require them to exercise superhuman judgment...Imposing such a requirement would inevitably induce tentativeness by officers, and thus deter police from protecting the public and themselves.

(*Scott v. Henrich, supra*, 39 F.3d at 915.)

**REASONABLENESS.** Self-defense requires both subjective honesty and objective reasonableness. (*People v. Aris* (1989) 215 Cal.App.3d 1178, 1186.) The United States Supreme Court has held that an officer’s right to use force in the course of an arrest, stop or seizure, deadly or otherwise, must be analyzed under the Fourth Amendment’s “reasonableness” standard. (*Graham v. Conner* (1989) 490 U.S. 386, 395.)

The ‘reasonableness’ of a particular use of force must be judged from the perspective of a reasonable officer on scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments—in circumstances that are tense, uncertain, and rapidly evolving—about the amount of force that is necessary in a particular situation.

(*Id.* at 396-397, citations omitted.)

The “reasonableness” test requires an analysis of “whether the officers’ actions are ‘objectively reasonable’ in light of the facts and circumstances confronting them, without regard to their underlying intent or motivation.” (*Id.* at 397, citations omitted.) What constitutes “reasonable” self-defense or defense of others is controlled by the circumstances. A person’s right of self-defense is the same whether the danger is real or merely apparent. (*People v. Jackson* (1965) 233 Cal.App.2d 639.) If the person’s beliefs were reasonable, the danger does not need to have actually existed. (CALCRIM 505.) Yet, a person may use no more force than is reasonably necessary to defend against the danger they face. (CALCRIM 505.)

When deciding whether a person’s beliefs were reasonable, a jury is instructed to consider the circumstances as they were known to and appeared to the person and considers what a reasonable person in a similar situation with similar knowledge would have believed. (CALCRIM 505.) When considered in the context of an officer-involved incident, this standard does not morph into a “reasonable police officer” standard. (*People v. Mehserle* (2012) 206 Cal.App.4<sup>th</sup> 1125, 1147.) To be clear, the officer’s conduct should be evaluated as “the conduct of a reasonable person functioning as a police officer in a stressful situation.” (*Id.*)

The *Graham* court plainly stated that digestion of the “totality of the circumstances” is fact-driven and considered on a case-by-case basis. (*Graham v. Connor, supra*, 490 U.S. at 396.) As such, “reasonableness” cannot be precisely defined nor can the test be mechanically applied. (*Id.*) Still, *Graham* does grant the following factors to be considered in the “reasonableness” calculus: the severity of the crime committed, whether the threat posed is immediate, whether the person seized is actively resisting arrest or attempting to flee to evade arrest. (*Id.*)

Whether the suspect posed an immediate threat to the safety of the officer or others has been touted as the “most important” *Graham* factor. (*Mattos v. Agarano* (9<sup>th</sup> Cir. 2011) 661 F.3d 433, 441-442.) The threatened use of a gun or knife, for example, is the sort of

immediate threat contemplated by the United States Supreme Court, that justifies an officer's use of deadly force. (*Reynolds v. County of San Diego* (9<sup>th</sup> Cir. 1994) 858 F.Supp. 1064, 1071-72 "an officer may reasonably use deadly force when he or she confronts an armed suspect in close proximity whose actions indicate an intent to attack.") Again, the specified factors of *Graham* were not meant to be exclusive; other factors are taken into consideration when "necessary to account for the totality of the circumstances in a given case." (*Mattos v. Agarano, supra*, 661 F.3d at 441-442.)

When undertaking this analysis, courts do not engage in *Monday Morning Quarterbacking*, and nor shall we. Our state appellate court explains,

under *Graham* we must avoid substituting our personal notions of proper police procedure for the instantaneous decision of the officer at the scene. We must never allow the theoretical, sanitized world of our imagination to replace the dangerous and complex world that policemen face every day. What constitutes 'reasonable' action may seem quite different to someone facing a possible assailant than to someone analyzing the question at leisure.

(*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343, citing *Smith v. Freland* (6<sup>th</sup> Cir. 1992) 954 F.2d 343, 347.) Specifically, when a police officer reasonably believes a suspect may be armed or arming himself, it does not change the analysis even if subsequent investigation reveals the suspect was unarmed. (*Reese v. Anderson* (5<sup>th</sup> Cir. 1991) 926 F.2d 494, 501; *Anderson v. Russell* (4<sup>th</sup> Cir. 2001) 247 F.3d 125, 129, 131.)

The Supreme Court's definition of reasonableness is, therefore, "comparatively generous to the police in cases where potential danger, emergency conditions or other exigent circumstances are present." (*Martinez v. County of Los Angeles, supra*, 47 Cal.App.4<sup>th</sup> at 343-344, citing *Roy v. Inhabitants of City of Lewiston* (1<sup>st</sup> Cir. 1994) 42 F.3d 691, 695.) In close-cases therefore, the Supreme Court will surround the police with a fairly wide "zone of protection" when the aggrieved conduct pertains to on-the-spot choices made in dangerous situations. (*Id.* at 343-344.) One court explained that the deference given to police officers (versus a private citizen) as follows:

unlike private citizens, police officers act under color of law to protect the public interest. They are charged with acting affirmatively and using force as part of their duties, because 'the right to make an arrest or investigatory stop necessarily carries with it the right to use some degree of physical coercion or threat thereof to effect it.'

(*Munoz v. City of Union City* (2004) 120 Cal.App.4<sup>th</sup> 1077, 1109, citing *Graham v. Connor*, [*supra*] 490 U.S. 386, 396.)

**NON-LETHAL FORCE.** This does not suggest that anything *less than* deadly force requires no justification. "[A]ll force—lethal and non-lethal—must be justified by the

need for the specific level of force employed.” (*Bryan v. MacPherson* (9<sup>th</sup> Cir. 2010) 630 F.3d 805, 825, citing *Graham [v. Conner]* (1989) 490 U.S. [386], 395.) The *Graham* balancing test, as described *supra*, is used to evaluate the reasonableness of lethal and non-lethal force, alike. (*Deorle v. Rutherford* (9<sup>th</sup> Cir. 2001) 272 F.3d 1272, 1282-83.)

Use of a taser or a shotgun-fired bean bag has been categorized as intermediate non-lethal force. (*Bryan v. MacPherson, supra*, 630 F.3d at 825[taser]; *Deorle v. Rutherford, supra*, 272 F.3d at 1279-80 [bean bag].) This designation exists despite the fact that such force is *capable* of being used in a manner causing death. (*Id.*) To be deemed “lethal force” the instrumentality must be force that “creates a substantial risk of death or serious bodily injury.” (*Smith v. City of Hemet* (9<sup>th</sup> Cir. 2005) 394 F.3d 689, 693.); use of a taser or shotgun-fired bean bag both fall short of this definition. (*Bryan v. MacPherson, supra*, 630 F.3d at 825; *Deorle v. Rutherford, supra*, 272 F.3d at 1279-80.)

Beyond the traditional *Graham* factors, and particularly in the use of non-lethal force, the failure of officers to give a warning and the subject’s mental infirmity can also be considered when assessing the totality of the circumstances. (*Bryan v. MacPherson, supra*, 630 F.3d at 831; *Deorle v. Rutherford, supra*, 270 F.3d at 1283-84.)

Failure to pass-muster under *Graham* can deem the use of non-lethal force as “excessive” and therefore violate the Fourth Amendment. (*Id.*) On the other hand, active resistance could justify multiple applications of non-lethal force to gain compliance and would not be deemed “excessive” nor violate the Fourth Amendment. (*Sanders v. City of Fresno* (9<sup>th</sup> Cir. 2008) 551 F.Supp.2d 1149, 1182 [not excessive to use physical force and tase an unarmed but actively resisting subject with 14 taser cycles where such was needed to gain physical control of him].)

## **ANALYSIS**

In this case, Officer Peterson had an honest and objectively reasonable belief that Hernandez posed an imminent threat of serious bodily injury or death. After responding to a call of a pedestrian walking on a freeway off ramp, Officer Peterson contacted Hernandez near his minivan. Although Hernandez advised Officer Peterson his minivan had simply overheated and he was waiting for the vehicle to cool down, Hernandez was pacing around and appeared upset. Officer Peterson observed Hernandez stop a few times and talk to the camera near the rear license plate of the minivan; Officer Peterson found the behavior odd. During the encounter, Hernandez told Officer Peterson he did not have a son and also stated he wanted to kill himself.

Concerned about Hernandez’ welfare, Officer Peterson requested an ambulance respond to the scene. Dispatch appeared to be unable to hear all of Officer Peterson’s communications over the radio. When Officer Peterson asked Hernandez to walk back to his patrol vehicle with him while they waited for the ambulance. Hernandez would not go back with Officer Peterson. Instead, Hernandez walked back to his minivan and retrieved a hammer from inside the vehicle. Hernandez held the hammer up in his right

hand, above his shoulder, and started advancing towards Officer Peterson. Officer Peterson immediately drew his duty weapon and pointed it at Hernandez. Officer Peterson backed up and tried to create some distance between himself and Hernandez. Officer Peterson ordered Hernandez to drop the hammer. Hernandez, however, refused to comply with Officer Peterson's verbal commands.

Hernandez continued to advance towards Officer Peterson. Hernandez told Officer Peterson, "Just fucking shoot me. Just fucking shoot me." At one point, when Hernandez stopped and started talking to the rear license plate of the minivan, Officer Peterson was able to transition to his taser with the hope of using less lethal force against Hernandez to stop any attack. Officer Peterson deployed his taser. The first deployment was ineffective and caused Hernandez to stand up and raise the hammer at Officer Peterson in a threatening manner. Officer Peterson had an honest and objectively reasonable belief Hernandez was going to charge at him and attack him with the hammer. Officer Peterson deployed the taser a second time. The second deployment was effective, causing Hernandez to drop the hammer and fall to the ground. Officer Peterson was then able to move the hammer out of Hernandez' reach and handcuff Hernandez.

Although the use of the taser was one contributing factor in Hernandez' cause of death, the use of less than lethal force by Officer Peterson was not unreasonable and excessive force was not used during the incident under review. Officer Peterson had an honest and objectively reasonable belief he was faced with an imminent attack by Hernandez with a hammer. Given the circumstances described, Officer Peterson's use of the taser was justified.

### **CONCLUSION**

Based on the facts presented in the reports and the applicable law, Officer Peterson's use of less than lethal force was not excessive and was a proper exercise of Officer Peterson's right of self-defense and therefore his actions were legally justified.

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